Supreme Court, U.S.
FILED

95-852 AUG 4 - 1995

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HOLIDAY INNS, INC., a Tennessee Corporation,
Petitioner,

vs.

GORDON MCNEELY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERICK J. LEWIS
(Counsel of Record)
THOMAS L. HENDERSON
RHONDA M. TAYLOR
MCKNIGHT, HUDSON, LEWIS & HENDERSON
6750 Poplar Avenue, Suite 301
P.O. Box 171375
Memphis, Tennessee 38187-1375
(901) 756-1550

Attorneys for Petitioner

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

54 pp

QUESTIONS PRESENTED

1. Does a charge of discrimination which is untimely or which has not been deferred to the appropriate state agency support the invocation of the single filing rule under the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. § 633(b)?

2. May an individual who filed an untimely charge of discrimination join an ADEA action by relying on another person's charge which does not contain allegations of class wide discrimination?

3. May an individual who filed an untimely charge of age discrimination revive his untimely charge by invoking the single-filing rule?

PARTIES TO THE PROCEEDING

In accordance with United States Supreme Court Rule 14.1(b), the names of all parties in this case appear in the caption of the opinion of the Court of Appeals. In accordance with Rule 29.1, Petitioner states that its publicly traded corporate parent(s) and wholly-owned subsidiaries are as follows:

Name	*Relationship*
Holiday Corporation (a Delaware Corporation)	100% Stockholder of Petitioner
Bass (USA) Incorporated (a Delaware Corporation)	100% Stockholder of Holiday Corporation
Bass International Holdings NV (a Netherlands Corporation)	100% Stockholder of Bass (USA) Incorporated
Bass PLC (a United Kingdom Corporation)	100% Stockholder of Bass International Holdings NV

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. An Untimely Or Non-Deferred Charge Cannot Support Invocation Of The Single Filing Rule	8
A. The Importance Of The Issue	8
B. The Court of Appeals' Opinion Conflicts With This Court's Holding In *Oscar Mayer & Co. v. Evans*, 411 U.S. 750 (1978).	13
II. An Individual Who Filed An Untimely Charge Of Discrimination May Not Join An ADEA Action By "Piggybacking" Upon Another Person's Charge Which Does Not Contain Class Wide Allegations Of Discrimination	14
A. The Importance Of The Issue.	14
B. There Is A Conflict In The Circuits.	16

III. An Individual Who Filed An Untimely Charge Cannot Revive His Untimely Charge By Invoking The Single Filing Rule 19

A. The Importance Of The Issue 19

B. There Is A Conflict In The Circuits 20

CONCLUSION 21

APPENDIX A

Judgment and Opinion of the Sixth Circuit Court of Appeals Entered March 7, 1995 ..... A-1

APPENDIX B

Order of the District Court Entered July 16, 1993 ..... A-19

APPENDIX C

Order of the Sixth Circuit Court of Appeals on Petition for Rehearing with Suggestion for Rehearing *En Banc* Entered May 9, 1995 ..... A-23

TABLE OF AUTHORITIES

Page(s)

A. CASES:

Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876 (8th Cir. 1977) 18

Anderson v. Montgomery Ward & Co. Inc., 852 F.2d 1008 (7th Cir. 1988) 4,9,14,17,18

Anderson v. Unisys Corp., 47 F.3d 307 (8th Cir. 1995)..... 20

Anson v. University of Texas Health Science Center, 962 F.2d 539 (5th Cir. 1992) 4,17,18

Astoria Fed. Sav. & L. Ass'n. v. Solimino, 501 U.S. 104 (1991) 10

Bean v. Crocker Nat'l. Bank, 600 F.2d 754 (9th Cir. 1979)..... 19

Clark v. Emerson Elec. Mfg. Co., 430 F. Supp. 216 (N.D. Miss. 1977)..... 12

Cornett v. AVCO Financial Services, 792 F.2d 447 (4th Cir. 1986) 13

EEOC v. Wilson Metal Casket Co., 24 F.3d 836 (6th Cir. 1994)..... 18

Howlett v. Holiday Inns, Inc., 49 F.3d 189 (6th Cir. 1995)..... 8,16

Jackson v. Richards Medical Co., 961 F.2d 575 (6th Cir. 1992)..... 12

Kloos v. Carter-Day Co., 799 F.2d 397 (8th Cir. 1986).....4,15,17,18

Lorillard v. Pons, 434 U. S. 575 (1978) 9

Lusardi v. Lechner, 885 F.2d 1062 (3d Cir. 1988)..... 4

Mistretta v. Sandia Corp., 639 F.2d 588 (9th Cir. 1980)..... 4,17

Mooney v. Aramco Services Co., 54 F.3d 1207 (5th Cir. 1995)..... 20

Naton v. Bank of Cal., 649 F.2d 691 (9th Cir. 1981) 4,17

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)....10,11,13

Parrish v. Ford Motor Co., 909 F.2d 1484 (table), 1990 WL 109188 (6th Cir. 1990) 18

Smith v. General Scanning, Inc., 832 F.2d 96 (7th Cir. 1987).....8,11,13

Tolliver v. Xerox Corp., 918 F.2d 1052 (2d Cir. 1990)..... 4,17

Voutsis v. Union Carbide Corporation, 452 F.2d 889 (2d Cir. 1971) 11

Whalen v. W. R. Grace & Co., 56 F.3d 504 (3d Cir. 1995).....4,16,17

Wheeler v. American Home Products Corp., 582 F.2d 891 (5th Cir. 1977) 18

B. STATUTES

28 U.S.C. § 1254(l) 2

29 U.S.C. § 216(b) 18

29 U.S.C. § 255 3

Age Discrimination in Employment Act, as amended, 29 U.S.C. § 626(d) 2,8,12

Age Discrimination in Employment Act, as amended, 29 U.S.C. § 626(e) 3,15

Age Discrimination in Employment Act, as amended, 29 U.S.C. § 633(b) 3,8,10,12,13

42 U.S.C. § 2000e *et seq.* 8

42 U.S.C. § 12201 *et seq.* 8

42 U.S.C. § 2000e-5(c) 11

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HOLIDAY INNS, INC., a Tennessee Corporation,

Petitioner,

vs.

GORDON MCNEELY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Holiday Inns, Inc. respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit entered March 7, 1995.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Tennessee is not reported. (App. B).[1] The opinion of the United States Court of Appeals for the Sixth Circuit entered March 7, 1995 is reported at 49 F.3d 189 (6th Cir. 1995). (App. A). The May 9, 1995 Order of the United States Court of Appeals for the Sixth Circuit denying rehearing and denying the suggestion for rehearing *en banc* is unreported. (App. C).

JURISDICTION

The judgment and opinion of the United States Court of Appeals were entered March 7, 1995. (App. A). A timely petition for rehearing with a suggestion for rehearing *en banc* was denied by Order dated May 9, 1995. (App. C). This petition is filed within 90 days of the entry of that Order. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(d), provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed -
>
> (1) Within 180 days after the unlawful practice occurred; or
>
> (2) In a case which section 633(b) of this Title applies, within 300 days after the unlawful practice occurred, or within 30 days after receipt by the individual of

---

[1] "App." refers to the Appendix to this Petition. "J.A." refers to the Joint Appendix filed with the Sixth Circuit.

> notice of termination of proceeding under state law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633(b), provides, in pertinent part:

> In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be brought under Section 626 of this Title before the expiration of 60 days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated.

The Age Discrimination in Employment Act of 1967, as amended,[2] 29 U.S.C. § 626(e), provides:

> Section 259 of this title shall apply to actions under this chapter.
>
> If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.

---

[2] Prior to its amendment in 1991, § 626(e)(1) provided that the two and three year statute of limitations codified at 29 U.S.C. § 255 applied to ADEA actions.

STATEMENT OF THE CASE

This petition arises out of Respondent Gordon L. McNeely's ("McNeely") attempt to join pending ADEA litigation against Petitioner Holiday Inns, Inc. ("Holiday Inns"). Despite the uncontroverted fact that he filed an untimely charge of age discrimination, McNeely nevertheless insists that he should be permitted to join the Plaintiffs' suit based on a charge filed by Plaintiff Graves Ivey.

In support of his argument, McNeely relies upon the "single-filing rule." This rule, which cannot be found in the text of the ADEA, has been fashioned by the Courts of Appeals, albeit according to conflicting standards,[3] to sometimes permit an individual who failed to file a timely charge of discrimination to join an action filed by a plaintiff who properly filed a timely, sufficient charge.

McNeely was employed in Memphis, Tennessee by Holiday Inns as an accounting supervisor. (J.A. 65, 103) He was notified on June 7, 1991, that his employment with Holiday Inns was being terminated in connection with a corporate reorganization, relocation (from Memphis to Atlanta) and an accompanying reduction in force. (J.A. 8, 54, 65, 103). Over 300 days later, on April 24, 1992, McNeely filed an untimely charge of age

---

[3] The following courts of appeal hold that the charge must contain allegations of classwide discrimination to support the application of the single filing rules: *Anson v. University of Texas Health Science Center*, 962 F.2d 535 (5th Cir. 1995); *Anderson v.Montgomery Ward & Co., Inc.*, 852 F.2d 1008 (7th Cir. 1988); *Naton v. Bank of Cal.*, 649 F.2d 691 (9th Cir. 1981); *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980); *Kloos v. Carter-Day Co.*, 799 F. 2d 397 (8th Cir. 1986); *Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988); *Whalen v. W. R. Grace & Co.*, 56 F.3d 504 (3d Cir. 1995).

In *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir. 1990) *cert. denied*, 499 U.S. 983 (1991), the Second Circuit adopted a standard which depends on the size of the workforce. Under that standard, classwide allegations are not required to be contained in an age charge.

discrimination with the Equal Employment Opportunity Commission ("EEOC") in Memphis, Tennessee. (J.A. 54 at ¶ 7, 103).

Plaintiff Graves Ivey ("Ivey") was employed by Holiday Inns as a District Director. (J.A. 8 at ¶ 16). Ivey was terminated when, due to Holiday Inns' reorganization, his position was eliminated. (J.A. 54). On December 10, 1991, 185 days after being notified of his termination, Ivey filed a charge of age discrimination against Holiday Inns with the EEOC in Jackson, Mississippi. (*Id.*).

On October 27, 1992, the Plaintiffs (but not McNeely) filed their Complaint and Demand for Jury Trial, alleging, in relevant part, that they had been discriminated against by Holiday Inns in its termination of their employment and its failure to rehire them, in violation of the ADEA. (J.A. 8). On June 4, 1993, Plaintiffs filed a Motion to Amend their Complaint to join McNeely as a party Plaintiff. (J.A. 54).

Plaintiffs conceded that McNeely's charge of discrimination was untimely. Nevertheless, plaintiffs argued that McNeely was a proper Plaintiff because he was "similarly situated" to them. (*Id.*). In support of their motion, Plaintiffs relied exclusively upon the charge filed by Graves Ivey, arguing that Ivey's charge alone provided sufficient basis for jurisdiction over McNeely's claim. (*Id.* at ¶¶ 2-7).

On July 16, 1993, the District Court entered an Order denying Plaintiffs' motion to amend. (J.A. 33). Although the District Court found that McNeely's charge was untimely, the Order noted that "several Courts of Appeal have held that failure to file a timely charge of discrimination with the EEOC does not bar a claim for relief under the ADEA where one or more of the Plaintiffs in the action filed a timely charge of discrimination with the EEOC which, at the very least, contain[s] an allegation of class-wide discrimination." (*Id.* at p. 2) (citation omitted). The District Court found in this case, however, the Ivey charge

did not satisfy the single filing rule's requirement of an allegation of class wide discrimination. Instead, the Court determined that Ivey's charge was an individual one, and, therefore, did not notify Holiday Inns or the EEOC of any alleged class-wide discrimination.[4] (*Id.* at pp. 34-36).

McNeely appealed to the United States Court of Appeals for the Sixth Circuit[5], which, in a divided panel opinion, reversed the holding of the District Court. The majority first acknowledged that "controversy" exists among the Courts of Appeal "over the test to use in determining whether an administrative charge will suffice to support piggybacking by a subsequent plaintiff." 49 F.3d at 194. The panel next rejected the holdings of a majority of Circuits (and its own unpublished prior opinion) which

---

[4] Ivey's charge, which the courts below agree does not contain any classwide allegations of age discrimination, states in pertinent part:

> On June 7, 1991, I learned that I would not be hired in any of the available positions for which I qualified after my District Director's position was eliminated.
>
> I, along with others similarly situated, was told that although my position was being eliminated, I could apply and would be considered for other available positions.
>
> I believe that I was discriminated against and denied further employment with this employer on the basis of my age, 54 since:
>
> I had been employed for 31 years and had a good employment record.
>
> Most of the employees hired into available positions after jobs were eliminated were younger, less senior, and less qualified persons.
>
> AMENDED
>
> Subsequent to the reorganization and as recent as January of February of 1992, I am being denied hire into positions such as General Manager, which are becoming available which are being filled by younger less qualified persons. (J.S. 58).

[5] The Plaintiffs never appealed the District Court's Order. McNeely filed his Notice of Appeal on August 12, 1993. (J.A. 37).

require that in order for an individual who has not personally complied with the ADEA's charge filing requirements to invoke the single filing rule, the charge relied upon must contain allegations of class wide discrimination. *Id.* at 195.

Although it agreed with the District Court that Ivey's charge did not contain allegations of class wide discrimination, the majority then discussed the single filing rule standards adopted by the Second Circuit. That standard holds that where "grievances arise in a work unit of modest size . . . mere similarity of the grievances within the same general time frame suffices to permit the 'single filing rule.'" *Id.* at 195. Despite the fact that the panel below determined that the record was inadequate and contained no evidence regarding the size of McNeely's work unit (or whether it was even coextensive with that of Ivey), it held that because only one more person sought to join the Plaintiffs' action, the single-filing rule did not bar the additional claim because the "floodgates" for additional Plaintiffs would not be opened. *Id.* at 196. Thus, the Court of Appeals ultimately held that McNeely should be allowed to join as a party Plaintiff.

REASONS FOR GRANTING THE WRIT

By holding that an individual who failed to file a timely charge of discrimination may join an ADEA action where that individual seeks to "piggyback" upon a charge which was not timely filed, has never been deferred to any state agency and which does not contain allegations of class wide discrimination, the Court of Appeals ignored the holdings of this Court and a majority of Circuits, upset the carefully crafted balance between state and federal enforcement of civil rights laws and virtually wrote the charge filing requirement and its dual purposes out of the ADEA.

Each of the questions presented by this petition have exceptional importance in light of their far reaching impact in the area of federal anti-discrimination statutes in addition to the ADEA, *e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and the Americans With Disabilities Act, 42 U.S.C. § 12201 *et seq.* and the likelihood of the recurrence of these questions. Further, the second and third questions presented by this petition are questions upon which the Courts of Appeal disagree, a division of authority which is borne out by the fact that the holding of the District Court in this case apparently would have been affirmed in at least the Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits.

I. An Untimely Or Non-Deferred A Charge Cannot Support Invocation Of The Single Filing Rule.

A. The Importance Of The Issue.

As the Court of Appeals agreed, in order to support "piggybacking" under any standard, the charge relied upon must be timely and not otherwise defective. *Howlett*, 49 F.3d at 194. The "ADEA has established clear pre-litigation filing requirements in two statutory provisions, 29 U.S.C. § 626(d) and § 633(b)." *Smith v. General Scanning, Inc.*, 832 F.2d 96 (7th Cir. 1987). A charge must be filed within either 180 or 300 days, and it must be deferred to the appropriate state agency. *Id.*

These provisions are not — in any sense — mere technicalities created to deter claims. Instead, their enforcement serves important goals. This Court has recognized the attention which Congress devoted to the ADEA's enforcement scheme:

> The enforcement scheme for the statute is complex — the product of considerable attention during the legislative debates preceding passage of the Act. Several alternative proposals were considered by Congress.
>
> * * *
>
> The bill that was ultimately enacted is something of a hybrid, reflecting, on the one hand, Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes.

Lorillard v. Pons, 434 U.S. 575, 578 (1978).

A timely charge is required to satisfy Congress' desire that employers have early notice of the age claims asserted against them and to allow the EEOC to have the opportunity to quickly eliminate the alleged unlawful practice through informal methods of conciliation. *Lorillard*, 434 U.S. at 579-80 (discussing the precursor of the charge — the notice of intent to sue);[6] *Anderson*

---

[6] In 1978, Congress deleted the requirement that a notice of intent to sue be given by one pursuing a ADEA lawsuit and, instead, adopted the requirement that a charge be filed. *See Anderson*, 852 F.2d at 1015. That charge was not intended to change the early notice requirement:

> This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notice prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the

(Footnote 6 continued on next page)

v. Montgomery Ward & Co. Inc., 852 F.2d 1008, 1015 (7th Cir. 1988).

The charge filing requirement of the ADEA thus promotes Congress' desire that age discrimination claims be quickly and informally resolved. The filing of ADEA lawsuits should be a last resort, undertaken only after other avenues of resolution have failed. Correspondingly, this requirement serves to lessen the burden on federal courts of hearing claims which should have (and could have) been resolved informally, pursuant to the state and federal procedures established by the ADEA and similar state laws. Only if timely notice is given to the employer, the state agency and the EEOC, can conciliation take place and unnecessary federal lawsuits avoided.

This Court also holds that the ADEA "requires that where a state has its own age-discrimination law, a federal Age Act complainant must first pursue his claim with the responsible state authorities before filing in federal court." *Astoria Fed. Sav. & Loan. Ass'n. v. Solimino*, 501 U.S. 104, 111 (1991) *citing* 29 U.S.C. § 633(b); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). In *Oscar Meyer*, this Court concluded that 514(b) of the ADEA (29 U.S.C. § 633(b)) "is intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." 441 U.S. at 756.

This requirement serves important purposes of federalism, as well as allowing for prompt, informal resolution of age claims.

(Footnote 6 continued)

> conferees intend that the "charge" requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory.

H.R.Conf.Rep. No. 954, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 504, 528, 534.

In *Oscar Meyer*, this Court recognized that § 14(b) of the ADEA served the same purposes as § 706(b) of Title VII, 42 U.S.C. § 2000e-5(c). *Id.* at 756. In discussing the purposes of § 706(b), this Court stated:

> Congress intended through § 706(b) to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in "a voluntary and localized manner." See 110 Cong. Record 12725 (June 4, 1964)(remarks of Sen. Humphrey). The section is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief by victims of the discrimination. *See Voutsis v. Union Carbide Corporation*, 452 F.2d 889 (2d Cir. 1971). Because state agencies cannot even attempt to resolve discrimination complaints not brought to their attention, the section has been interpreted to require individuals in deferral States to resort to appropriate state proceedings before bringing suit under Title VII.

Id. at 755.

Thus, § 14(b) allows the states to first attempt to resolve age discrimination claims before they are presented to federal agencies and, potentially, federal courts. *See Smith v. General Scanning, Inc.*, 832 F.2d 96, 99 (7th Cir. 1987)(the deferral provisions of the ADEA "allows the appropriate administrative bodies an opportunity to bring about compliance with the Act in nonlitigious ways").

Here, the Court of Appeals acknowledged that the sole charge relied upon by McNeely is that of Graves Ivey. 49 F.3d at 196. It also acknowledged that Ivey's charge was filed in Jackson, Mississippi, 185 days after Ivey became aware of the decision to terminate his employment with Holiday Inns. 49 F.3d at 193.

Mississippi is a non-deferral state, and, consequently, charges must be filed there within 180 days. *See Clark v. Emerson Elec. Mfg. Co.*, 430 F. Supp. 216 (N.D. Miss. 1977). However, the Court of Appeals held that because it assumed that the conduct alleged by Ivey occurred in Tennessee (although there was no record evidence to support its conclusion) and because Tennessee is a deferral state, Ivey's charge was timely filed because it was filed within 300 days of the allegedly discriminatory action. *See* 29 U.S.C. §§ 626(d), 633(b); *Jackson v. Richards Medical Co.*, 961 F.2d 575, 579 (6th Cir. 1992)(Tennessee is a deferral state for ADEA purposes). In so holding, the Court of Appeals ignored the fact that Ivey's charge was never deferred to the appropriate Tennessee agency. 29 U.S.C. § 633(b).

Thus, the opinion of the Court below allows individuals who never filed timely charges to base their ADEA lawsuit on a charge which is — itself — either untimely or not deferred. By so holding, the Court paves an express route to federal court, which allows unknown plaintiffs to bypass the carefully created procedures set by Congress and enforced by the courts. Instead of resolution of claims by conciliation attempts by the state, then federal agencies, the race to the courthouse will become the norm. Instead of having notice of the age claims asserted, employers will never know who may sue them. Instead of devoting their limited time and resources to genuine disputes, federal courts will be faced with deciding lawsuits which could have been resolved months or years earlier without federal court intervention. Such a result flies in the face of the intent of Congress, the express language of the ADEA, cuts states out of the picture, and for no good reason, increases the burdens on federal courts.

B. The Court Of Appeals' Opinion Conflicts With This Court's Holding In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

This Court has held that the commencement of state proceedings is mandatory under § 633(b) of the ADEA. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979). Thus, the opinion of the Court of Appeals conflicts with this Court's decision in *Evans*.

Following this Court's holding in *Evans*, in *Smith v. General Scanning, Inc.*, 832 F.2d 96 (7th Cir. 1987), the Seventh Circuit dismissed the Plaintiff's ADEA action for failure to commence state proceedings in the appropriate state agency. In so holding, the Court in *General Scanning* stated that "it is clear than an aggrieved employee must assert his claim in the appropriate state agency and the EEOC before he can file an age discrimination claim in federal district court." *Id.* at 100. Illustrative of the seriousness with which § 633(b) has been taken by the Courts, the Court in *General Scanning* stated that it was of no consequence that the Plaintiff's charge had been deferred by the EEOC to the wrong state agency, even though such failure was through no fault of the Plaintiff. *Id.* (citing *Cornett v. AVCO Financial Services*, 792 F.2d 447 (4th Cir. 1986)).

Unquestionably, under no set of facts did Ivey comply with the ADEA's charge filing requirements. If Mississippi were the appropriate State for filing McNeely's charge, his charge should have been filed within 180 days. By his own admission, it was not. Alternatively, even accepting that Tennessee was the appropriate state for filing this charge, that charge was not deferred to any Tennessee agency. Thus, the charge is either untimely or was not properly deferred. In either event, it does not comply with the ADEA's requirements.

As Ivey did not file a timely and otherwise non-defective charge of discrimination, McNeely was not entitled to rely on Ivey's charge in support of McNeely's piggybacking efforts. It

would be anomalous to hold that one may "piggyback" on a charge on which the "pig" himself may not proceed. Any other conclusion ignores the holding of this Court in *Evans* as well as the intended federal/state sharing of the ADEA's (and other anti-discrimination statutes') enforcement. Thus, review by this Court is necessary and appropriate.

II. An Individual Who Filed An Untimely Charge Of Discrimination May Not Join An ADEA Action By "Piggybacking" Upon A Charge Which Does Not Contain Class Wide Allegations Of Discrimination.

A. The Importance Of The Issues.

As set forth above, the charge filing requirements of the ADEA are crucial to its enforcement scheme and serve two equally important functions. First, the charge filing requirement builds in due process for the employer, whereby the employer is entitled to timely notice of the range of potential claims and parties so that it may "understand, during the conciliation stage, the magnitude of [its] potential claims." *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1015-16 (7th Cir. 1988). The charge filing requirement also furthers the ADEA's goal of informal resolution of claims of discrimination by notifying the appropriate state agency and the EEOC of the identities of those individuals on whose behalf they should seek conciliation. *Id.*

Although the majority purportedly relied upon these purposes in reaching its decision, the "standard" articulated in its opinion advances neither of them. To the contrary, the Court of Appeals' reasoning inevitably leads to a result which simply cannot be reconciled with the purposes of the filing requirement.

Applying the majority's holding, employers and the EEOC would be required to treat every charge as a potential class claim because the charge itself — the statutorily intended vehicle of notification of discrimination claims — will not be required to

provide such information. Thus, in effect, the majority repealed the ADEA's charge filing requirement.

The majority's holding runs afoul of the ADEA in yet another way. The ADEA's statute of limitations for filing litigation has been amended to conform to that of Title VII. *See* 29 U.S.C. § 626(e)(2)) (1991). The ADEA's prior statute of limitations required that any action under the ADEA must have been filed within two or three years, depending on whether the violations were "willful." *See* 29 U.S.C. § 626(e)(2) (1972). Thus, at the end of the two or three year period, there would be no more potential plaintiffs. Under the amendments to the ADEA, the same would not hold true. Instead, the time period in which untold numbers of potential plaintiff would be able to intervene in an action by invoking the single filing rule is virtually infinite.

The majority's holding illustrates the impact of this ADEA amendment. In holding that McNeely would be permitted to join the Plaintiffs' action, the majority relied almost exclusively on the expiration of the ADEA's prior two year statute of limitations with respect to any additional plaintiffs other than McNeely. However, under the amendments to section 626(e) of the ADEA, the same could not have been said. Instead, the potential for opening the "floodgates" for additional plaintiffs would have loomed indefinitely, a result acknowledged, albeit then cast aside, by the majority.

The Court in *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986) accurately summarized the importance of requiring charges relied upon in invoking the single filing rule to contain class allegations:

> Failure to require some notice of class claims in the charge would require the employer to treat all individual charges as potential class actions. This consequence is of particular significance in the age discrimination arena, where every employed person over the age of forty is a potential plain-

> tiff. The charge filing provisions limits the chances for the filing of suits based on subsequent notification and reassessments. (citation omitted). We disagree with the view that unsuccessful conciliation following an individual charge probably means that conciliation efforts would have been just as fruitless under a charge that gave notice of class claims.

B. There Is A Conflict In The Circuits.

A direct conflict currently exists between the holdings of the Courts of Appeal for Third, Fifth, Seventh, Eighth, Ninth and Tenth Circuits and the Courts of Appeal for the Second and Sixth Circuits as to whether a charge must contain class wide allegations of discrimination in order to support "piggybacking" by an individual who failed to file a timely charge of discrimination.[7] The standard adopted by an overwhelming majority of Circuits to address the issue is summarized by the holding of the Eighth Circuit:

> An administrative charge of one or more Plaintiffs setting forth only personal claims of discrimination, however, is not sufficient to serve as the basis for an ADEA class action. To be faithful to the purposes of the filing requirement, an administrative charge must allege class-wide age discrimination or claim to represent a class in order to serve as the basis for an ADEA under section 216(b).
>
> * * *
>
> Allowing class actions without administrative charges that fairly anticipate class claims would undermine the notice

---

[7] The Circuits also are divided as to whether the single filing rule may be invoked in actions other than class actions. *Compare Whalen v. W.R. Grace & Co.*, 56 F.3d 504 (3d Cir. 1995) (single filing rule applicable only in class actions) with *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189 (6th Cir. 1995) (single filing rule applicable to individual actions).

> and conciliation purposes for the filing requirement. An allegation of class-wide discrimination or claim of class representation is necessary to inform and give notice to the employer that the consequences of an individual plaintiff's charge may "transcend[] an isolated individual claim."

Kloos v. Carter-Day Co., 799 F.2d 397, 400 (8th Cir. 1986) (citations omitted); *see also Whalen v. W.R. Grace & Co.*, 56 F.3d 504 (3d Cir. 1995); *Anson v. Univ. of Tex. Health Sci. Ctr.*, 962 F.2d 539 (5th Cir. 1992); *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008 (7th Cir. 1988); *Naton v. Bank of California.*, 649 F.2d 691 (9th Cir. 1981); *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

In contrast and direct conflict with this standard, the Second Circuit has held:

> Where the grievances arise in a work unit of modest size . . . we agree that mere similarity of the grievances within the same general time frame suffices to permit the "single filing rule."
>
> * * *
>
> Though we do not think the administrative claim in such circumstances need specify that the claimant purports to represent a class or others similarly situated, there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who wish to piggyback on the claim.

Tolliver v. Xerox Corp., 918 F.2d 1052, 1058 (2d Cir. 1990).

Tolliver was recited nearly verbatim by the majority here, despite the holdings of the majority of other Circuits and in conflict with the Sixth Circuit's own prior holding in an unre-

ported opinion.[8] *See Parrish v. Ford Motor Co.*, 909 F.2d 1484 (table) 1990 WL 109188 (6th Cir. 1990) (charge must contain class allegations in order to support joinder of class action claims in individual ADEA action).

If this Court does not clarify the appropriate standard to be applied in determining whether a charge permits joinder of parties under the single filing rule, the notice required, and indeed guaranteed, under the ADEA will vary according to the Circuit in which the alleged discriminatory act occurs. Employers and the EEOC in some Circuits will be entitled to rely on the charges filed as defining the realm of potential Plaintiffs, while employers and the EEOC in other Circuits run the risk of encountering precisely the situation sought to be avoided by the ADEA's notice and conciliation requirement, *i.e.*, unknown, never anticipated Plaintiffs. This result runs counter to Congress' conscious decision in the enactment of the ADEA to avoid unknown Plaintiffs. *See Anderson*, 852 F.2d at 1016 (citing 29 U.S.C. § 216(b). ("there are no anonymous Plaintiffs under the ADEA.")

The issue whether a charge of discrimination which does not contain class wide allegations of discrimination may be relied upon by an individual who failed to file a timely charge is certain to recur. Given the importance of this issue and conflict among

---

[8] In its opinion, the Court of Appeals made reference to, but did not rely upon, its decision in *E.E.O.C. v. Wilson Metal Casket Co.*, 24 F.3d 836 (6th Cir. 1994). *Wilson Metal Casket* involved the application of the single filing rule in the Title VII context, and the Court of Appeals relied only upon cases involving Title VII with respect to the single filing rule. Importantly, some of the cases relied upon by the majority in *Wilson Metal Casket* have not been followed in the ADEA arena. *Compare Wheeler v. Amer. Home Prod. Corp.*, 582 F.2d 891 (5th Cir. 1977) with *Anson v. Univ. of Tex. Health Science Ctr.*, 962 F.2d 539 (5th Cir. 1992) *and Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir. 1977) with *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986).

the Courts of Appeal, the Court should resolve this issue as soon as possible.

III. An Individual Who Filed An Untimely Charge Cannot Revive His Untimely Charge By Invoking The Single Filing Rule.

A. The Importance Of The Issue.

The purposes of the single filing rule are administrative convenience and the avoidance of futile acts. *Bean v. Crocker Nat. Bank*, 600 F.2d 754, 760 n.15 (9th Cir. 1979). Where those purposes are consistent with the purposes of the ADEA, application of the single filing rule is appropriate. However, where an individual files an untimely charge which is investigated and conciliated by the EEOC, these considerations do not apply.

The purposes of the single filing rule (and other judicially created exceptions to the ADEA) are not served by applying such "rules" to an individual who seeks to benefit from them despite the fact that he knew to file a charge, failed to file it in accordance with the ADEA's requirements and offers no excuse for his failure to comply with the ADEA.[9]

Judicially created exceptions to the ADEA and to other anti-discrimination legislation such as the single filing rule were not intended to be utilized as an escape hatch for individuals who fail to adhere to the strictures of those statutes. Instead, these exceptions simply were intended to create a framework within which federal anti-discrimination statutes and the realities of life could comfortably co-exist, without diminishing or diluting Congress' direction and purpose in the enactment of such statutes and their requirements.

---

[9] Graves Ivey is the former head of Petitioner's Employee Relations Department. As such, he presumably was aware of the ADEA's charge filing periods.

In this case, the Court of Appeals ignored the legal reality that the single filing rule is not a benefit to which McNeely is automatically entitled in order to excuse his untimely filing of his charge. McNeely knew to file a charge but failed to timely do so. Nevertheless, McNeely simply seeks to latch onto what he hopes is a means by which to escape his failure to comply with the ADEA requirements. McNeely should not be permitted to succeed in this endeavor which runs counter to the plain language of the ADEA and the purpose of the single filing rule.

B. There Is A Conflict In The Circuits.

In conflict with the Sixth Circuit's opinion, at least two other Courts of Appeal have held that failure to file a charge which complies with the ADEA's requirements alters the analysis under single filing rule.

In *Anderson v. Unisys Corp.*, 47 F.3d 307, 308-09 (8th Cir. 1995), the Court held that:

> For those plaintiffs who have never filed an administrative charge and who are allowed to piggyback on the filed claim of another, we deem it reasonable to permit them to join suit as long as the claimant on whose administrative filing they have relied timely filed suit after receiving Right to Sue letters from the state and federal agencies.
>
> Those plaintiffs who do file administrative charges however should be bound by the statute of limitations, which is stated in the Right to Sue letter. Even if those plaintiff's are piggybacking on another employee's timely administrative charge, *once they file separate administrative charges, they cannot rely any further on the other claimant's action.*

(emphasis added).

Likewise, in *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995), the Court held that an individual who filed

an EEOC charge could not rely upon the charge of another in order to append claims which were not contained in his original EEOC charge, regardless of whether the individuals are similarly situated.

The opinions in *Mooney* and *Anderson* directly conflict with the holding of the majority here that "a potential plaintiff who has filed an untimely EEOC charge is not given any more of a second bite of the apple than any plaintiff who brings a civil action under the ADEA after filing an EEOC charge." 49 F.3d at 197.

Thus, the issue whether an individual who has filed an untimely charge of discrimination under the ADEA may nevertheless invoke the single filing rule in an effort to revive his untimely claim is an important issue and is one which has provoked disagreement among the Circuits. Moreover, it is an issue which is likely to recur. Consequently, this issue should be resolved by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Frederick J. Lewis
(Counsel of Record)
Thomas L. Henderson
Rhonda M. Taylor
McKNIGHT, HUDSON, LEWIS & HENDERSON
6750 Poplar Avenue, Suite 301
P. O. Box 171375
Memphis, Tennessee 38187-1375
(901) 756-1550

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-6100

Ronald H. Howlett; Graves B. Ivey; Siegfried K. Konetzny; Jeffrey E McLaughlin; Homayoon Meshginpoosh; Terry Phillips; Edward Rinckel; Frederick C. Roozen Christopher R. Ryan; Rene H. Schiegg; and Fred Wright,

Plaintiffs,

Gordon McNeely,

Appellant,

v.

Holiday Inns, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Tennessee

[Decided and Filed Mar. 7, 1995]

Before: MARTIN and BATCHELDER, Circuit Judges; and COHN, District Judge.*

COHN, D. J., delivered the opinion of the court, in which MARTIN, J., joined. BATCHELDER, J. (pp. 15-16), delivered a separate dissenting opinion.

I.

COHN, District Judge. This is an age discrimination case under the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 621, *et seq.* The complaint was filed by eleven named

---

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

plaintiffs[1] and alleges that appellee, Holiday Inns, Inc. (Holiday Inns), discriminated against them on the basis of age in its termination of their employment and its failure to rehire them. The named plaintiffs and appellant, Gordon L. McNeely (McNeely), moved to join McNeely as a party plaintiff, but were denied on the ground that the district court did not have jurisdiction over McNeely's claim. McNeely appeals from the denial, arguing that although his charge of age discrimination with the EEOC was untimely, the "single filing rule" should operate to vest jurisdiction over his claim because he is similarly situated to the named plaintiffs who did file timely charges of age discrimination with the EEOC. For the reasons that follow, the district court's decision will be reversed.

II.

Holiday Inns owns, operates, and manages hotels throughout the United States. In the spring of 1991, Holiday Inns moved its Memphis, Tennessee operations to Atlanta, Georgia in the course of reorganizing its corporate structure. Holiday Inns's reorganization involved a reduction in work force.

McNeely worked for Holiday Inns in Memphis, Tennessee as an accounting supervisor. He was born on October 25, 1941, and began working for Holiday Inns in 1976. On June 7, 1991, McNeely and the named plaintiffs were told that they were terminated from employment with Holiday Inns. After notifying McNeely of his termination, Holiday Inns requested that he continue working for several months and sign a waiver and release of all rights immediately. He complied with both requests, and worked for Holiday Inns until October, 1991. McNeely trained Linda Butler (Butler), who was twenty-eight years old, in

---

[1] The named plaintiffs are Ronald H. Howlett, Graves B. Ivey, Siegfried K. Konetzny, Jeffrey E. McLaughlin, Homayoon Meshginpoosh, Terry Phillips, Edward Rinckel, Frederick C. Roozen, Christopher R. Ryan, Rene H. Schiegg, and Fred Wright.

his duties for several weeks before leaving Holiday Inns. Butler had been hired in September, 1991.

On April 24, 1992, McNeely filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in Memphis. The parties agree that McNeely's charge was not timely.

Named plaintiff Graves B. Ivey (Ivey) was also informed on June 7, 1991, that he would be terminated from his employment with Holiday Inns, where he had worked as a District Director in the Franchise Division. Ivey filed a charge of discrimination with the EEOC in Jackson, Mississippi on December 10, 1991, 185 days later. Ivey's charge, after amendment in February, 1992, reads:

> On June 7, 1991, I learned that I would not be hired in any of the available positions for which I was qualified after my District Director's position was eliminated.
>
> I, along with others similarly situated, was told that although my position was being eliminated, I could apply and would be considered for other available positions.
>
> I believe that I was discriminated against and denied further employment with this employer on the basis of my age, 54, since:
>
> I had been employed for 31 years and had a good employment record.
>
> Most of the employees hired into available positions after jobs were eliminated were younger, less senior, and less qualified persons.
>
> Subsequent to the reorganization and as recent as January or February of 1992, I am being denied hire into positions such as General Manager, which are becoming available

> [and] which are being filled by younger less qualified persons.

On October 22, 1992, the named plaintiffs filed a complaint alleging age discrimination.[2] On June 4, 1993, McNeely and the named plaintiffs moved to amend the complaint and to join McNeely as a named plaintiff under Fed.R.Civ.P. 15 and 20, respectively. The district court denied the motion in an order entered July 9, 1993, holding that it did not have jurisdiction over McNeely's claim because McNeely had not timely filed an EEOC charge. McNeely filed a notice of appeal on August 12, 1993.

III.

A.

On appeal, McNeely argues that his failure to file a timely EEOC charge should be excused under the single filing rule. McNeely says that under the single filing rule, "[a]n individual can be exempted from the administrative filing requirement if a timely charge arising out of similar discriminatory treatment was filed by another aggrieved employee." In order to invoke the single filing rule, McNeely says, the charge relied upon must be (1) timely and not otherwise defective, and (2) must arise out of discriminatory treatment similar to, and occurring in the same time frame as, that suffered by the party seeking to invoke the rule. Here, McNeely says, the EEOC charges filed by ten of the eleven named plaintiffs satisfy both requirements, and therefore are sufficient to allow McNeely to "piggyback" on them.

McNeely argues that the district court erred in requiring that the charge on which he seeks to piggyback his claim contain an

---

[2] Plaintiff Homayoon Meshginpoosh also raised claims of discrimination on the basis of national origin, in violation of Title VII, 42 U.S.C. § 2000e *et seq*, and 42 U.S.C. § 1981. The district court apparently dismissed the § 1981 claim in an order not included in the record before the Court.

explicit allegation of class-wide discrimination, contending that a timely charge based on similar discriminatory treatment can function to put an employer on notice of a potential group lawsuit even if it does not explicitly claim class-wide discrimination. Here, he says, the charges of the named plaintiffs "contained allegations virtually identical to the claims raised by McNeely," and therefore gave Holiday Inns and the EEOC notice of the possibility that other claims could be raised. McNeely points out that Ivey's charge refers to Ivey and "others similarly situated," and that it states that "most of the employees hired into available positions after jobs were eliminated were younger, less senior, and less qualified persons." McNeely recognizes that some circuits have incorporated a requirement of class allegations into the single filing rule, but states that the requirement has not been universally adopted, and urges this Court to reject it.

The purposes of the administrative charge requirement, McNeely says, are to afford the employer notice of the allegations it faces and to permit the EEOC to attempt conciliation. *Anderson v. Montgomery Ward*, 852 F.2d 1007, 1016 (7th Cir. 1988). McNeely argues that these purposes are met by timely charges, such as the Ivey charge, that address the discriminatory actions that form the basis of the piggybacker's claim. In such a case, McNeely says, requiring the filing of additional charges with the EEOC, or requiring additional language in the charges filed, is wasteful and is likely to be futile.

B.

Holiday Inns responds that the district court properly denied the motion to join McNeely as a party plaintiff because he did not timely file an EEOC charge. Holiday Inns offers several alternative reasons why McNeely should not benefit from the application of the single filing rule. First, Holiday Inns argues, the single filing rule should not be invoked in the case of a claimant who filed an untimely EEOC charge, as McNeely did, as opposed to one who never filed a charge. Holiday Inns says the purposes of

the single filing rule are administrative convenience and the avoidance of futile acts, and that these ends are not served by allowing the filer of an untimely EEOC charge to invoke the single filing rule, because the EEOC will already have investigated his charge and attempted conciliation by the time the claimant "seeks his 'second bite at the apple.'"

Second, Holiday Inns argues that Ivey's EEOC charge was not timely filed, and therefore cannot support the application of the single filing rule. While Ivey's charge was filed within the 300 day period of limitations applicable to Tennessee, Holiday Inns argues that because Ivey's charge was filed in Mississippi against Holiday Inns, headquartered in Atlanta, Georgia, he should have filed within the 180 day period of limitations applicable to Mississippi and Georgia.[3] Since Ivey's charge was filed 185 days after he was terminated, Holiday Inns says, his charge was not timely and cannot support application of the single filing rule.

Third, Holiday Inns argues that the district court correctly found that an EEOC charge can only support application of the single filing rule if it contains an allegation of class-wide discrimination, and that Ivey's charge contains no such allegation. Holiday Inns says that "[t]he Circuits uniformly hold that the single filing rule can be invoked only where a timely age discrimination charge notifies the employer and the EEOC that class-wide discrimination is alleged," citing a number of Court of Appeals opinions, including an unpublished opinion of this Court, *Parrish v. Ford Motor Co.*, 909 F.2d 1484, 1990 Westlaw 109188 at **7 (6th Cir. 1990). Holiday Inns says the requirement of an allegation of class-wide discrimination serves the purposes

---

[3] Georgia and Mississippi are not "deferral states" for the purpose of the ADEA's administrative charge requirement, because they do not have state laws "prohibiting discrimination in employment because of age." 29 U.S.C. § 622(b). See discussion at p. 8, *infra*.

of giving the employer notice of its potential liability and the EEOC the opportunity to conciliate all potential claims, and that acceptance of McNeely's position would thwart these purposes. Holiday Inns characterizes McNeely's position as abolishing the notification requirement of the single filing rule, and says the position is "unworkable as a practical matter" and would impose on the EEOC the burden of investigating and attempting to conciliate class claims in all charges, to the prejudice of employers, who wouldn't receive notice of their potential liability, and charging parties, who would face delay and a possible failure of the conciliation process.

Holiday Inns says the district court correctly found that Ivey's charge does not contain allegations of class-wide discrimination. It emphasizes that the charge focuses on Ivey's failure to obtain another position with Holiday Inns and contains only "a vague reference to others." In short, Holiday Inns says, "it is clear that the claimed discrimination is against Ivey personally," and that there is no "express" allegation of class-wide discrimination.

IV.

A.

As a prerequisite to bringing a civil action under the ADEA, a claimant must first file a charge of unlawful discrimination with the EEOC. 29 U.S.C. § 626(d). The time frame in which the claimant must file his EEOC charge depends on the state in which the unlawful practice occurred. If a state has "a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice," it is known as a "deferral state." 29 U.S.C. § 633(b). If the discriminatory act occurred in a deferral state, the EEOC charge must be filed within 300 days of the discriminatory act. 29 U.S.C. § 626(d)(2). Charges concerning discriminatory acts that occurred in non-

deferral states must be filed within 180 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(1). A claimant may not file a civil action under the ADEA until sixty days have passed since the filing of the EEOC charge. 29 U.S.C. § 626(d). In a deferral state, the claimant must also have commenced proceedings under state law before filing a civil action under the ADEA. The ADEA suit may then be brought at least sixty days after the commencement of state proceedings, or earlier if the state proceedings are terminated before the sixty day period has expired. 29 U.S.C. § 633(b).

It is not necessary in all circumstances, though, that the EEOC charge be filed by the individual bringing suit under the ADEA. "[C]ourts have regularly held that the timely filing of an administrative charge by a named plaintiff in a class action satisfies the charge filing obligation of all members of the class." *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990). The "single filing rule," which allows the administrative charge of one plaintiff to satisfy the charge filing obligations of other plaintiffs, was recognized by this Court in the context of a Title VII case in *Equal Opportunity Comm'n v. Wilson Metal Casket Co.*, 24 F.3d 836 (6th Cir. 1994). Although the opinion in *Wilson Metal Casket Co.* did not address the applicability of the single filing rule to a case brought under the ADEA, the federal courts to address the issue have uniformly held that the rule is applicable in the ADEA context. *Anson v. Univ. of Texas Health Ctr.*, 962 F.2d 539, 541 (5th Cir. 1992); *see also Anderson v. Montgomery Ward,* 852 F.2d 1008, 1014-17 (7th Cir. 1988) (discussing the similarities and differences between Title VII and ADEA lawsuits). We join those courts in holding that the single filing rule applies to ADEA cases.

It is uncontroversial that the "single filing rule" is not limited to class actions but also can permit a plaintiff to join individual ADEA actions if the named plaintiff filed a timely administrative charge sufficient to permit "piggybacking" by the joining

plaintiff. *Tolliver*, 918 F.2d at 1057. Controversy arises, though, over the test to use in determining whether an administrative charge will suffice to support piggybacking by a subsequent plaintiff.

Holiday Inns asserts that "the Circuits uniformly hold that the single filing rule can be invoked only where a timely age discrimination charge notifies the employer and the EEOC that class-wide discrimination is alleged," while McNeely says an administrative charge will support application of the single filing rule if it "arise[s] out of similar discriminatory treatment in the same time frame." The reality is more complicated than either party admits. As the Second Circuit summarized in *Tolliver*,

> Courts have used different tests, either alone or in combination, for determining whether an administrative charge suffices to permit piggybacking by a subsequent plaintiff. The broadest test requires only that the claims of the administrative claimant and the subsequent plaintiff arise out of the same circumstances and occur within the same general time frame. That is the test we used in *Snell* [*Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986) (applying single filing rule in Title VII context)] in permitting piggybacking by correctional officers alleging discrimination in a county jail. A somewhat narrower test requires that the administrative claim give notice that the discrimination is "class-wide," *i.e.*, that it alleges discrimination against a class of which the subsequent plaintiff is a member. *See Kloos v. Carter-Day Co.*, 799 F.2d 397, 401 (8th Cir. 1986) (alternate standard). A still narrower test requires that the administrative charge not only allege discrimination against a class but also allege that the claimant purports to represent the class or others similarly situated. *See Naton v. Bank of California*, 649 F.2d 691, 697 (9th Cir. 1981).

Tolliver, 918 F.2d at 1057-58.

The question of which test to apply must be approached with an eye to the purpose served by the administrative charge requirement:

> the basic purpose of the notice requirement . . . is to provide the [EEOC] with sufficient information so that It may notify prospective defendants and to provide the [EEOC] with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation.

Anderson v. Montgomery Ward & Co., Inc., 852 F.2d 1008, 1015 (7th Cir. 1988) (quoting H.R.Conf.Rep. No. 950 95th Con., 2d Sess., *reprinted in* 1978 *U.S. Code Cong. & Admin. News* 504, 528, 534). Thus a charge will be adequate to support piggybacking under the single filing rule if it contains sufficient information to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit if filed. As the Second Circuit recognized in *Tolliver,* whether an administrative charge will suffice to permit piggybacking by subsequent plaintiffs therefore depends to a large degree on the type of work unit involved:

> Where the grievances arise in a work unit of modest size, like the jail in *Snell* or the union local in *Allen v. Amalgamated Transit Union Local 778*, [554 F.2d 876 (8th Cir.), *cert. denied,* 434 U.S. 891 (1977)], we agree that mere similarity of the grievances within the same general time frame suffices to permit the "single filing rule." As former Judge Bell asked in the context of claims by employees at a single plant, "If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful[?]" *Oatis v. Crown Zellerbach,* 398 F.2d [496,] 498 [(5th Cir. 1968)]. However, where the grievances are alleged to arise throughout a large group, the lack of conciliation of one individual grievance does not necessarily mean that conciliation efforts would be unavailing if the EEOC and the employer

> were alerted to the broad scope of the claim. Though we do not think the administrative claim in such circumstances need specify that the claimant purports to represent a class or others similarly situated, there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim. Such a claim alerts the EEOC that more is alleged than an isolated act of discrimination and affords sufficient notice to the employer to explore conciliation with the affected group.

Tolliver, 918 F.2d at 1058 (footnote omitted).

B.

Here, the record lacks information that would be helpful in analyzing the sufficiency of the Ivey charge to support piggybacking by others. While the record does show that McNeely worked as an accounting supervisor for Holiday Inns in Memphis, Tennessee, it does not identify the work unit we should look to in determining whether the administrative charges on which he seeks to rely are sufficient to permit him to piggyback his claim. Additionally, though McNeely seeks to rely on other timely EEOC charges filed by named plaintiffs, the other plaintiffs' charges are not included in the record, so we are unable to evaluate whether they would support the piggybacking of McNeely's claim.

Despite the inadequacies of the record, though, the particular factual circumstances of this case simplify our analysis. As McNeely's counsel acknowledged during oral argument, because the statute of limitations has now run, McNeely is the only individual who could possible [sic] piggyback on Ivey's charge. Under these specific circumstances, the lack of information as to the size of McNeely's work unit is not fatal, because it is undisputed that whatever our decision, no one other than McNeely could possibly join this action. We therefore are not presented

with a case with the potential to open the floodgates to large numbers of would-be plaintiffs, who were unforeseen by both the EEOC and Holiday Inns at the time of the EEOC's investigation. Instead, we have one potential additional plaintiff, a situation analogous to the small work unit scenario discussed in *Tolliver*, where one may fairly ask "If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful?" *Id.* (citation omitted).

Ivey's charge makes two references to people other than Ivey:

> I, *along with others similarly situated*, was told that although my position was being eliminated, I could apply and would be considered for other available positions....
>
> Most of the *employees* hired into available positions after jobs were eliminated were younger, less senior, and less qualified persons.

(emphasis added). While the charge falls short of an allegation of class wide discrimination, it certainly provides notice that individuals other than Ivey were affected by Holiday Inns's actions, and that those who were affected were older, more senior employees. In this case, Ivey's charge is sufficient to support piggybacking by McNeely. It was clearly foreseeable to both the EEOC and Holiday Inns from Ivey's charge that the alleged unlawful practices affected others along with Ivey, and there is no reason to believe that Holiday Inns would have reacted differently or the EEOC would have had a better opportunity to conciliate had McNeely timely filed. McNeely may therefore invoke the single filing rule and join the named plaintiffs. This decision does not open Holiday Inns to any potential liability beyond the addition of McNeely.

C.

Holiday Inns also argues that McNeely should not be allowed to take advantage of the single filing rule because he filed an

untimely EEOC charge, as opposed to a potential plaintiff who never filed an EEOC charge, and because Ivey's charge itself was untimely filed.

1.

Holiday Inns's argument that McNeely should be precluded from involving the single filing rule because he filed an untimely EEOC charge is without merit. As is discussed above, the purpose of requiring the filing EEOC charges

> is to provide the [EEOC] with sufficient information so that it may notify prospective defendants and to provide the [EEOC] with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation.

Anderson, 852 F.2d at 1015. The single filing rule serves to prevent a wooden application of the administrative charge requirement where the ends of the requirement have already been satisfied. The purpose of the single filing rule is no less well served in application to a potential plaintiff who has filed an untimely EEOC charge than to one who has never filed an administrative charge. A potential plaintiff who has filed an untimely EEOC charge is not given any more of a "second bite at the apple" than any plaintiff who brings a civil action under the ADEA after filing an EEOC charge.

2.

Holiday Inns's argument that Ivey's charge was untimely filed is also unconvincing.[4] The unlawful practice alleged in Ivey's charge occurred in Tennessee, a deferral state. By the ADEA's own terms, the relevant filing period is determined by reference to the state in which the claim arose. *See* 29 U.S.C. §§ 626(d)(2), 633(b); *Ciccone v. Textron, Inc.*, 651 F.2d 1 (1st Cir.),

---

[4]This argument was not before the district court; Holiday Inns raised it for the first time on appeal.

cert. denied, 452 U.S. 917 (1981). Therefore, because Ivey's charge was filed within the 300 day period applicable to deferral states, his charge was timely. It is irrelevant that the charge was filed in Mississippi and that Holiday Inns is headquartered in Georgia, both of which are non-deferral states, because we look to the state in which the claim arose in determining the applicable filing period.

V.

For the reasons stated, the district court's denial of the motion to join McNeely as a party plaintiff is REVERSED.

ALICE M. BATCHELDER, Circuit Judge, dissenting. I would affirm the judgment of the district court denying plaintiffs' motion to amend their complaint to join Appellant McNeely as a plaintiff in this ADEA action. The district court's order held that McNeely's failure to file a timely EEOC charge would not bar his claim for relief under the ADEA if one or more of the plaintiffs in the ADEA action had filed a timely charge that was sufficient to put the employer and the EEOC on notice that class-wide discrimination was being claimed. The court then found that the EEOC charge upon which McNeely claimed the right to "piggyback" was insufficient.

We review for abuse of discretion the district court's denial of a motion to amend a complaint to join a party plaintiff. *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986). We review *de novo* the legal conclusions upon which the district court based that denial. *Id.* The district court reviewed the case law from those circuits which have spoken on the question at issue here,[1] and concluded that *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008 (7th Cir. 1988), and the other cases which establish what has come to be called the "single-filing rule," require that the timely-filed charges on which a plaintiff such as McNeely attempts to rely must "at the very least, contain an allegation of class-wide discrimination." *Id.* at 1016. The district court reviewed the timely-filed charge of Graves Ivey on which Appellant McNeely attempts to rely and concluded that it could not be construed as alleging class-wide discrimination.

The majority opinion neither adopts nor rejects the careful analysis of *Anderson*. Neither does it set out any test or standard to be used in this circuit to determine the adequacy of a timely

---

[1] This circuit has spoken only in an unpublished opinion, *Parrish v. Ford Motor Co.*, No. 89-6290, 1990 WL 109188 (6th Cir. Aug. 2, 1990), but that opinion would, in my judgment, clearly support the district court's conclusion here.

EEOC charge when it is claimed as the basis for piggybacking under the single-filing rule. The majority does hold that in this case the record is inadequate to analyze whether the Ivey charge is sufficient to support the piggybacking of other claimants. And the majority concede that the Ivey charge "falls short of an allegation of class wide discrimination." The majority opinion then tips its hat to the purpose behind the EEOC filing requirement, which is that the EEOC and the employer are entitled to notice of the potential scope of the employer's potential liability, and rules that because the statute of limitations has expired and Appellant McNeely is therefore the only individual who could now piggyback on Ivey's charge, the inadequacy of the record does not matter and the Ivey charge is good enough.

I would hold that the analysis in *Anderson* is correct, and that the charge upon which a potential plaintiff such as McNeely attempts to rely must clearly apprise the defendant "during the conciliation process of the possibility of a subsequent lawsuit with many plaintiffs." *Anderson*, 852 F.2d at 1016. I agree with the majority's conclusion that the Ivey charge does not meet this requirement. Accordingly, I would hold that the district court's understanding of the law was not erroneous, and that the district court did not abuse its discretion in denying the motion to amend the complaint. I would affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.: 93-6100

RONALD H. HOWLETT; GRAVES B. IVEY;
SIEGFRIED K. KONETZNY; JEFFREY E MCLAUGHLIN;
HOMAYOON MESHGINPOOSH; TERRY PHILLIPS;
EDWARD RINCKEL; FREDERICK C. ROOZEN
CHRISTOPHER R. RYAN; RENE H. SCHIEGG;
FRED WRIGHT,

Plaintiffs,

GORDON MCNEELY,

Appellant,

v.

HOLIDAY INNS, INCORPORATED,

Defendant - Appellee.

Before: **Martin** and **Batchelder**, Circuit Judges; and **Cohn**, District Judge.

JUDGMENT

[Filed: March 7, 1995]

ON APPEAL from the United States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate:
June 16, 1995

A True Copy.

Attest:

/s/ Patty Elder
Deputy Clerk

APPENDIX B

ON THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 92-2885

RONALD H. HOWLETT, et al.,
Plaintiff,

vs.

HOLIDAY INNS, INC., a Tennessee corporation,
Defendant.

ORDER DENYING PLAINTIFFS' MOTION TO ADD GORDON L. McNEELY AS A PARTY PLAINTIFF

[Filed: July 9, 1993]

Before the court is plaintiffs'[1] motion to join Gordon L. McNeely as a party plaintiff and to amend their complaint. Plaintiffs, all former employees of defendant, allege that defendant discriminated against them on the basis of their age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S. C. §§ 621 *et seq.*[2], when they were terminated during a reduction in defendant's workforce in the spring of 1991 McNeely began working for defendant in 1976. When the workforce reduction was announced, he was informed that his job was being eliminated but that he might apply for another position in

---

[1] Ronald H. Howlett; Graves B. Ivey; Siegfried K. Konetzny; Jeffrey E. McLaughlin; Homayoon Meshginpoosh; Terry Phillips; Edward Rinckel; Frederick C. Roozen; Christopher R. Ryan; Rene H. Schiegg; and Fred Wright.

[2] One of the plaintiffs, Homayoon Meshginpoosh, also contends that defendant discriminated against him on the basis of his race, Arab-American, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

the company for which he felt qualified. McNeely did not find another position and, on June 7, 1991, defendant informed him that he was terminated. At defendant's request, McNeely continued working until October 1991. McNeely did not file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) until April 24, 1992, more than 300 days after his termination.

Because Tennessee is a "deferral" state which has enacted its own laws against age discrimination in employment, a plaintiff who seeks relief under the ADEA in Tennessee must file a charge of discrimination with the EEOC within 300 days of the alleged discriminatory employment practice. 29 U.S.C. § 626(d). However, the filing of an EEOC charge is not a jurisdictional prerequisite to suit under the ADEA. *Jackson c. Richards Medical Co.*, 961 F.2d 575 (6th Cir. 1992). Thus, several courts of appeal have held that failure to file a timely charge of discrimination with the EEOC does not bar a claim for relief under the ADEA where one or more of the plaintiffs in the action filed a timely charge of discrimination with the EEOC which "at the very least, contain[s] an allegation of class-wide discrimination." *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988). *See also Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986); *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-94 (10th Cir. 1980); *Bean v. Crocker Nat'l Bank*, 600 F.2d 754, 759 (9th Cir. 1979). This exception to the filing requirements at § 626(d) applies regardless of whether the action is a multiple plaintiff joint action or a representative action under 29 U.S.C. § 216(b).[3] *See Anderson.*

---

[3] Section 216(b) permits an action "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." However, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

Plaintiffs contend that McNeely should be permitted to join the action as a party plaintiff because hie is similarly situated to them and because the timely charge of discrimination filed by plaintiff Graves Ivey put defendant on notice that "a pattern of age discrimination was being alleged and that a large group lawsuit was likely." Defendant argues that Ivey's charge is insufficient to invoke the exception to § 626(d) relied on by plaintiffs because it fails to allege discrimination against a class and is purely an individual allegation of discrimination. After reviewing Ivey's charge, the court agrees with defendant.[4] Ivey does not state that he was discriminated against as part of class; he states that defendant discriminated against him. He refers to defendant's treatment of other employees only in describing the workforce reduction which led to his termination. Because the court concludes that Ivey's charge of discrimination failed to give defendant fair and adequate notice of a potential class charge of discrimination, the exception to § 626(d) described in *Anderson* and the other cases relied on by plaintiffs does not

---

[4] The charge states:

> On June 7, 1991, I learned that I would not be hired in any of the available positions for which I was qualified after my District Director's position was eliminated.
>
> I, along with others similarly situated, was told that although my position was being eliminated, I could apply and would be considered for other available positions.
>
> I believe that I was discriminated against and denied further employment with this employer on the basis of my age, 54, since:
>
> I had been employed for 31 years and had a good employment record.
>
> Most of the employees hired into available positions after jobs were eliminated were younger, less senior, and less qualified persons.
>
> Subsequent to the reorganization and as recent as January or February of 1992, I am being denied hire (sic) into positions such as General Manager which are becoming available which are being filled by younger less qualified persons.

apply. McNeely's failure to satisfy the deadline in § 626(d) cases therefore deprives the court of jurisdiction over his claim, and plaintiffs' motion to add McNeely as a party plaintiff is accordingly denied.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons

JULIA SMITH GIBBONS
UNITED STATES
DISTRICT JUDGE

July 8, 1993
DATE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-6100

RONALD H. HOWLETT, ET AL.,
Plaintiffs,
GORDON MCNEELY,
APPELLANT,
v.
HOLIDAY INNS, INC., A TN. CORPORATION
Defendant-Appellee.

ORDER

[Filed: May 9 1995]

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

---

* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
OCT 2 1995
OFFICE OF THE CLERK

No. 95-352

In The

Supreme Court of the United States

October Term, 1995

HOLIDAY INNS, INC., a Tennessee Corporation,

Petitioner,

vs.

GORDON McNEELY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RUDY J. HUIZENGA
Counsel of Record
BETH M. RIVERS
HUIZENGA, HAGAN, HERGT & RIVERS, P.C.
Attorneys for Respondent
1400 Penobscot Building
Detroit, Michigan 48226
(313) 963-4200

7532
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly formulated and applied the "single filing rule" in that the purposes of the charge filing requirement were fully satisfied.

2. Whether the question of the timeliness of the charge supporting the application of the single filing rule which was not raised in the trial court can be considered by this Court.

LIST OF PARTIES

The petitioner, Holiday Inns, Inc., is a Tennessee corporation, which was the defendant-appellee in the court below.

Respondent, Gordon McNeely, is an individual.

Others who are not petitioners or respondents are plaintiffs in the District Court proceedings. These individuals are: Ronald Howlett, Graves Ivey, Siegfried Konetzny, Jeffrey McLaughlin, Homayoon Meshginpoosh, Terry Phillips, Edward Rinckel, Frederick Roozen, Christopher Ryan, Rene Schiegg and Fred Wright.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statute Involved	2
Statement of the Case	2
Reasons for Denying the Writ	6
I. The formulation of the single filing rule adopted and applied by the Sixth Circuit does not conflict with its prior decisions or other circuits.	6
II. The single filing rule is available to individuals whose charge was untimely.	11
III. Based on the record, Ivey's charge is sufficient to invoke the single filing rule.	15
Conclusion	18

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977) 7

Anderson v. Montgomery Ward, 852 F.2d 1007 (7th Cir. 1988) 7, 8, 10, 12

Anderson v. Unisys Corp., 47 F.3d 302 (8th Cir. 1995) ... 13, 14

Bean v. Crocker National Bank, 600 F.2d 754 (9th Cir. 1979) 8, 9

Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kansas 1973) 9

Church v. Consolidated Freightways, 137 F.R.D. 294 (N.D. Cal. 1991) 11

EEOC v. Wilson Metal Casket Co., 24 F.3d 836 (6th Cir. 1994) 7, 10

Ezell v. Mobile Hous. Bd., 709 F.2d 1376 (11th Cir. 1983) 7

Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981) 7

Gray v. Phillips Petroleum, 638 F. Supp. 789, *recon. den.*, 49 F.E.P. Cases 65 (D. Kansas 1986) 11

Contents

	Page
Kloos v. Carter Day, 799 F.2d 397 (8th Cir. 1986)	8
Lilly v. Harris-Teeter Supermarket, 720 F.2d 362 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984)	7
Lusardi v. Lechner, 855 F.2d 1062 (3rd Cir. 1988), *cert. denied*, 111 S. Ct. 1641 (1991)	7, 9
Mistretta v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980) .	7, 9
Mooney v. Aramco, 54 F.3d 1207 (5th Cir. 1995)	13, 14
Oatis v. Crown Zellerbach, 398 F. Supp. 496 (1968)	12
Oscar Mayer v. Evans, 441 U.S. 750 (1979)	17
Parrish v. Ford Motor Co., 909 F.2d 184, 1990 W.L. 109188 (6th Cir. 1990)	10
Philbin v. GE Capital Auto Lease, 929 F.2d 326 (7th Cir. 1991)	17
Steffen v. Meridian Life Insurance Co., 859 F.2d 534 (7th Cir. 1988)	17
Tolliver v. Xerox Corp., 918 F.2d 1052 (2nd Cir. 1990) ...	7, 8, 9
Watson v. Fuller Brush Co., 570 F. Supp. 1299 (W.D. Mich. 1983)	13
Wheeler v. American Home Prods. Corp., 563 F.2d 1233 (5th Cir. 1977)	7

Contents

Page

Zuckerstein v. Argonne Nat'l Laboratory, 663 F. Supp. 569 (N.D. Ill. 1987) 6, 7, 13

Statutes Cited:

29 U.S.C. § 621, *et seq.* 2

29 U.S.C. § 626(d) 16

29 U.S.C. § 633(b) 16

Other Authorities Cited:

5 Rep. No. 493, 95th Cong., 1st Sess., 12 (1977) 11

29 C.F.R. § 1626.7 17

29 C.F.R. § 1628.8 17

No. 95-352

In The

Supreme Court of the United States

October Term, 1995

HOLIDAY INNS, INC., a Tennessee Corporation,

Petitioner,

vs.

GORDON McNEELY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondent, Gordon McNeely, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, Holiday Inns, Inc.

OPINIONS BELOW

This case was brought in the Western District of Tennessee pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, by 11 plaintiffs, who are not parties to this proceeding. Leave was sought to add McNeely as a party-plaintiff to this action. The trial court, finding that it did not have jurisdiction over McNeely's claim, denied that request in an unpublished opinion. (App. B, pp. A19-A22.)[1]

The Sixth Circuit Court of Appeals reversed the trial court's denial of leave to amend the complaint to add McNeely as a party plaintiff. The court's opinion, issued on March 7, 1995, is reported at 49 F.3d 189 (6th Cir. 1995). (App. A., pp. A1-A18.)

Following the issuance of the Sixth Circuit Opinion, Holiday Inns moved for a rehearing with suggestion for rehearing en banc. The Sixth Circuit denied that request in an unpublished opinion issued on May 9, 1995. (App. C, pp. A23-A24.)

STATUTE INVOLVED

The statute in issue is the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*

STATEMENT OF THE CASE

Holiday Inns' petition arises from the Sixth Circuit's decision to permit respondent Gordon McNeely to join as a party plaintiff an age discrimination claim pending in the Western District of Tennessee. That lawsuit, brought by 11 former employees of petitioner Holiday Inns, Inc., alleged that the

---

1. "App." refers to the Appendix to Holiday Inns' Petition for Writ of Certiorari.

termination of plaintiffs' employment had been impermissibly based on age in violation of the ADEA. The Court of Appeals applied the single filing rule which permits an individual who has not filed a timely charge of discrimination to rely, or piggy-back, on charges timely and properly filed by other plaintiffs. This rule has been adopted by all Circuits which have considered the issue in the context of the ADEA and Title VII.

The plaintiffs and McNeely were all employed by Holiday Inns, Inc. Each of them was notified that their jobs were eliminated and told to apply for any position within the company for which they were qualified. Despite their applications, McNeely, the named plaintiffs, and many other employees were notified on June 7, 1991, that they were terminated. (JA, pp. 8-32.)[2]

Specifically, McNeely applied for the position of Senior Accountant and notified Holiday Inns that he would be willing to accept other positions for which he was qualified. McNeely, however, was not selected for any position. After notifying McNeely of his termination, Holiday Inns requested that he continue working for several months and sign a waiver and release of all rights immediately. McNeely complied with both requests. He remained with Holiday Inns until October, 1991. (JA, pp. 87-89.)

In September 1991, Holiday Inns hired Linda Butler, who was 28 years old, as Senior Accountant. McNeely trained her for several weeks before he left the company. (*Id.*)

The 11 plaintiffs filed timely charges of age discrimination with the Equal Employment Opportunity Commission. In these charges, plaintiffs stated that they were instructed to apply for

---

2. "JA" refers to the Joint Appendix filed with the Sixth Circuit.

other available positions, were then informed on June 7, 1991 that they would not be placed in any available positions, and were therefore terminated. Further, the charges contained allegations that younger, less qualified employees were hired in positions for which the plaintiffs were qualified.

For example, Graves Ivey, one of the original plaintiffs, filed a charge which stated that he "along with others similarly situated" was told his position was being eliminated, that "most of the employees hired . . . were younger, less senior and less qualified persons" and that after the reorganization, "positions are becoming available which are being filled by younger, less qualified persons." (JA, p. 58.) These charges, by their numbers and similar allegations, put the EEOC and Holiday Inns on notice of potential class claims. (*Id.*)

Subsequently, plaintiffs filed a judicial complaint alleging age discrimination on October 22, 1992. (JA, pp. 8-33.) On June 4, 1993, plaintiffs and McNeely filed a Motion to Amend the complaint to add McNeely as a party plaintiff. (JA, p. 54.) Contrary to petitioner's assertions, plaintiffs did not rely solely on Graves Ivey's charge to support the amendment. Plaintiffs, in fact, relied on all "the charges filed by the named plaintiffs" which alleged similar factual circumstances to those under which McNeely was terminated to meet the notification requirement of the ADEA. (JA, pp. 55-56, ¶¶ 2-6.) Although the plaintiffs and McNeely established that the amendment was proper because McNeely was similarly situated to plaintiffs and defendant was on notice that the consequences of the plaintiffs' EEOC charges may "transcend an isolated individual's claim", the motion was denied by Judge Gibbons in an order entered on July 16, 1993. (App. B, pp. A19-A22.)

The District Court found only that "Ivey's charge failed to give [Holiday Inns] fair and adequate notice of a potential class

charge of discrimination" and therefore denied plaintiffs' motion. The court never addressed the timeliness of Ivey's charge because the petitioner never raised the issue.

McNeely appealed to the Sixth Circuit Court of Appeals which reversed the trial court's decision. In its March 7, 1995 opinion, the court held that Ivey's charge "provides notice that individuals other than Ivey were affected by Holiday Inns' actions and that those who were affected were older more senior employees." The court concluded "McNeely may invoke the single filing rule and join the named plaintiffs." (App. A, A-12.)

In reaching this decision, the Sixth Circuit joined the other circuits in holding that the single filing rule applied to ADEA cases. (App. A, A1-A18.) Also, in accord with the other Circuits, the Sixth Circuit concluded that a charge must satisfy the notice and conciliation functions of the filing requirement by indicating that a group of individuals, not just one aggrieved person, was affected by the employer's action. There was nothing novel in this approach.

The Sixth Circuit, then applied the standard to this case. Because the size of the relevant work unit could not be determined from the record, the court utilized two different analyses, finding sufficient notice to the EEOC and employer to support piggy-backing in both instances. The court concluded that because McNeely was the only potential plaintiff in his case, his situation was analogous to the small work unit. Thus Ivey's charge, which raised grievances identical in substance and time to McNeely's, was sufficient. In addition the court found the Ivey charge contained sufficient information to provide notice to defendants that individuals other than Ivey, like McNeely, were affected by Holiday Inns' actions. Since adequate notice was provided, the single filing rule was properly invoked. The decision of the trial court, therefore, was properly reversed.

REASONS FOR DENYING THE WRIT

The Sixth Circuit's adoption and application of the single filing rule fully comported with prior holdings of the other Circuits and its own decisions. The standard used also fulfilled the purposes of the charge filing requirement as established by this Court and the Circuit courts. Moreover, the first question presented by petitioner, *i.e.*, the timeliness of the relied upon charge, was not preserved for appeal. Ultimately the petitioner has failed to present any special or important reasons for granting the petition, nor any other basis recognized by this Court, and as a result, the petition should be denied.

I.

THE FORMULATION OF THE SINGLE FILING RULE ADOPTED AND APPLIED BY THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ITS PRIOR DECISIONS OR OTHER CIRCUITS.

At issue in this appeal are the requirements for application of the "single-filing" rule. It is undisputed that not every aggrieved individual must file an administrative charge of age discrimination to maintain, file, or participate in a judicial action. The single filing rule has been formulated by the courts[3] so that an individual who has not filed a timely administrative charge, *i.e.*, a "non-complying plaintiff" can join in a lawsuit if reliance can be placed on a charge of another individual which was timely and relevant. *Zuckerstein v. Argonne Nat'l Laboratory*, 663 F. Supp.

---

3. Although the single filing rule is not explicitly contained in the ADEA, the statute was amended in 1978 to provide only that a charge need be filed, eliminating the requirement that "the individual" give notice of intent to bring suit. Thus the statute clearly allows the charge filing requirement to be met by someone other than the aggrieved individual, including another person alleging discrimination against the same employer.

569 (N.D. Ill. 1987). Indeed, the EEOC has concluded that the filing requirement is satisfied "so long as the matter complained of was within the scope of a previously filed charge, regardless of who filed it." 43 Fed. Reg. 138, 139 (1983).

The single filing rule has been adopted without controversy by all Circuit Courts which have considered the issue. *See, e.g., Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2nd Cir. 1990); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326-335 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); *Lusardi v. Lechner*, 855 F.2d 1062 (3rd Cir. 1988), *cert. denied*, 111 S. Ct. 1641 (1991); *Ezell v. Mobile Hous. Bd.*, 709 F.2d 1376, 1381 (11th Cir. 1983); *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981); *Wheeler v. American Home Prods. Corp.*, 563 F.2d 1233, 1239 (5th Cir. 1977); *Anderson v. Montgomery Ward*, 852 F.2d 1007 (7th Cir. 1988); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 882-883 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); and *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

The Sixth Circuit recently adopted the single filing rule. In *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836 (6th Cir. 1994), the court applied the single filing rule in a Title VII case to allow a sexual harassment complainant who had not filed a charge to piggy-back on a timely filed charge arising out of events which had occurred three years earlier.

In those cases applying the single filing rule, the courts have looked to the purposes of the charge filing requirement to determine whether a particular charge will support piggy-backing. The administrative filing serves two functions. First, it allows the EEOC to "promptly notify all persons named in such charge as prospective defendants in the action" and second, it provides an "opportunity to eliminate the alleged unlawful

practices through informal methods of conciliation."[4] *Bean v. Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979); *Anderson v. Montgomery Ward*, 852 F.2d 1007, 1016 (7th Cir. 1988). In essence, the charge must notify the EEOC and thereby the employer that the consequences of the charge may "transcend an isolated individual's claim," so that the employer "recognizes the magnitude of potential liability." *Bean, supra*, at 760.

This notification requirement in the context of the single filing rule has been expressed differently by the various Circuit courts, yet all with the same intent. The court will only apply the rule if the employer was on notice of a potential group action. The Eighth Circuit, in *Kloos v. Carter Day*, 799 F.2d 397, 400 (8th Cir. 1986), held that the administrative agency must be notified of potential class claims.[5] Similarly, the Seventh Circuit, in *Anderson, supra*, held that the administrative charge must contain an allegation of class-wide discrimination.

In *Tolliver, supra*, the Second Circuit held that a charge supports piggy-backing if it contains sufficient information to notify prospective defendants of their potential liability, *i.e.*, "that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback." *Id.* at 1056. Two different levels of notice were specified. In small groups,

---

4. Contrary to petitioner's argument on p. 14, the charge would never notify the EEOC of the "identities" of potential plaintiffs. Even a charge alleging class-wide discrimination or brought on behalf of those similarly situated would not disclose the specific identities of the individuals. Thus, potential plaintiffs would remain anonymous until they sought to join the litigation.

5. Although the holding of *Kloos* indicates that the notice of class-wide claims must be in the charge itself, the court actually looked at other factors, including the number of claims filed and a letter from counsel, to determine if the notice to the EEOC was sufficient.

"mere similarity of grievances within the same general time frame" suffices to permit the single filing rule. For a large group, the EEOC and defendant must be "alerted to the broad scope of the claim". The Third Circuit has also held that no prejudice can be asserted by an employer if the complying charge notifies the employer that it discriminated against a class, not just a single individual. *Lusardi, supra*, at 1078.[6]

Following these holdings, the Sixth Circuit found a sufficient basis to allow McNeely to invoke the single filing rule. The Sixth Circuit first determined McNeely's situation was *analogous* to a small work unit described in *Tolliver* because McNeely was the only potential plaintiff who could join the *Howlett* action. As a result, Ivey's charge, which alleged grievances identical to McNeely in the same time frame, sufficed to permit piggy-backing.

The majority opinion also found that the single filing rule could be invoked based on the Ivey charge because the language provided "notice that individuals other than Ivey were affected by Holiday Inns' actions, and that those who were affected were older, more senior employees". (Slip Op., p. 12.) In his charge, Ivey stated that he "along with others similarly situated" were told that their positions were being eliminated but that they could apply and be considered for other positions. He also charged that the *employees* hired into available *positions* were younger, less senior and less qualified *persons*." (JA, p. 58.) The court correctly

---

6. Similar holdings, although cited by petitioner, are in actuality consistent with the *Howlett* opinion and, therefore, do not conflict with the Sixth Circuit. For example, the Tenth Circuit, in *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-594 (10th Cir. 1980), followed *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D. Kansas 1973), and held that "it was not necessary for each of the plaintiffs to file notice if those who joined by consent were limited to the same issues" raised in the timely filed charge. The Ninth Circuit reached the same result in *Bean, supra.*

concluded from these allegations "that it was clearly foreseeable to both the EEOC and Holiday Inns that the "alleged unlawful practices affected others along with Ivey." (Slip Op., p. 12.) Since the charge notified the EEOC of the potentiality of a multi-plaintiff case, the Sixth Circuit determined McNeely could participate in the pending lawsuit as a party plaintiff.

Thus, the McNeely decision does not conflict with other Sixth Circuit cases[7] or other Circuit Courts of Appeals. The Sixth Circuit merely followed the well developed case law requiring notification of a potential group action by a complying plaintiff to invoke the single filing rule.

The petitioner's demand for a more stringent standard is premised on its desire for no anonymous plaintiffs. Although Congress mandated that there be no anonymous plaintiffs under the ADEA by virtue of the opt-in requirement,[8] there is no similar

---

7. Petitioner has repeatedly claimed that *Parrish v. Ford Motor Co.*, 909 F.2d 184 (table) 1990 W.L. 109188 (6th Cir. 1990), held that the single filing rule requires allegations of class-based discrimination and therefore conflicts with this case. *Parrish*, however, did not even discuss piggy-backing or the single filing rule. It dealt exclusively with the right of an individual plaintiff to add class based allegations to his judicial complaint. That amendment was rejected because the additional allegations were not part of *his* EEOC charge. In fact, the Sixth Circuit decided this issue in a case that petitioner repeatedly ignores (and in fact has not even cited to this Court), *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836 (6th Cir. 1994). There, the Sixth Circuit, citing ADEA cases, adopted the single filing rule in a Title VII context, holding that "where a substantially related non-filed claim arises out of the same time frame as a timely filed charge, the complainant need not satisfy Title VII's filing requirement to recover".

8. Under Title VII, class actions proceed on an opt-out process so that there can be thousands of unnamed unknown class members. The process for ADEA claims is the exact opposite. An aggrieved individual must opt-in or be named to participate in the litigation. *Anderson, supra.*

requirement at the charge filing stage. Thus, an individual may remain anonymous until actually filing a complaint, or joining pending litigation as a party plaintiff. Even a charge containing allegations of class-wide discrimination does not provide the employer with the identities of all future plaintiffs. Thus, petitioner's request for a more stringent standard than that adopted by the Sixth Circuit and other courts would serve no purpose other than to deny aggrieved individuals access to court.[9] If the EEOC is notified of the "class nature" of a charge so that conciliation can occur, there is no justification for placing an onerous burden on laypeople, forcing them to meet hyper-technical requirements which are not even part of a remedial statute. *Church v. Consolidated Freightways*, 137 F.R.D. 294 (N.D. Cal. 1991).[10]

II.

THE SINGLE FILING RULE IS AVAILABLE TO INDIVIDUALS WHOSE CHARGE WAS UNTIMELY.

The single filing rule has been applied to individuals who have not filed charges at all, as well as those who filed charges

---

9. This argument runs afoul of congressional intent, expressed when it amended the filing requirements of the ADEA in 1978 "to make it more likely that courts would reach the merits of the cases of aggrieved individuals" because the most common basis for dismissal of lawsuits was failure to file timely notices. 5 Rep. No. 493, 95th Cong., 1st Sess., 12 (1977).

10. In fact, several decisions have held that the notice of a potential multi-plaintiff claim need not come solely from the charge. In *Gray v. Phillips Petroleum*, 638 F. Supp. 789, *recon. den.*, 49 F.E.P. Cases 65 (D. Kansas 1986), two charges, personal in nature, relating to a termination policy provided sufficient notice of a potential group action. In *Church, supra*, notice of a group action obtained from affidavits, as well as the number of other charges filed, was sufficient.

which were untimely. Yet petitioner contends that the rule should be limited to individuals who never filed a charge. This proposition, however, is not supported by existing case law. Nor is it consistent with the purposes of the charge filing requirement or the single filing rule.

The single filing rule was adopted, in part, to prevent wasteful and futile acts.

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. *Oatis v. Crown Zellerbach*, 398 F. Supp. 496, 499 (1968).

For "if it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful." *Oatis, supra*, at 498. In this case, petitioner had the opportunity to conciliate 11 charges of discrimination and nothing was settled or accomplished. Whether McNeely filed late or not at all would not have affected this result. Thus, the Sixth Circuit properly refused to draw any distinction.

No reported case distinguishes between an individual who filed an untimely charge and one who filed no charge at all. In fact, the single filing rule has been applied in situations where the potential plaintiff filed an untimely charge. In *Anderson, supra*, seven individuals who had filed untimely charges with EEOC joined other plaintiffs in filing a lawsuit alleging violations of the ADEA. The employer sought to dismiss the seven plaintiffs who had not filed timely EEOC charges. Although the lower court granted the employer's motion, the Seventh Circuit ultimately held that the seven plaintiffs could proceed with the suit despite their untimely EEOC filings.

Similarly, in *Zuckerstein, supra*, plaintiff, who had filed an untimely charge with the EEOC, was allowed to participate in an ADEA lawsuit by relying on another aggrieved individual's charge which had been filed timely. *See also, Watson v. Fuller Brush Co.*, 570 F. Supp. 1299 (W.D. Mich. 1983), which held that the fact that one named plaintiff filed his administrative charge late did not bar his reliance on a timely filed charge.

The cases cited by defendant do not conflict with the holding of the Sixth Circuit in this case, the Seventh Circuit in *Anderson*, or other cited decisions of the district courts, as they deal with entirely different issues.

In *Anderson v. Unisys Corp.*, 47 F.3d 302 (8th Cir. 1995), individuals who had received right-to-sue notices from the EEOC, which starts the running of the statute of limitations, failed to file lawsuits. Long after the 90 day limitations period had run, these individuals attempted to join the already filed *Anderson* action. The lower court dismissed their claims for failure to comply with the statute of limitations and an appeal was taken. The Eighth Circuit, agreeing with the lower court, held:

> we agree with the district court that the *failure of those plaintiffs to file suit within ninety days after the receipt of their right-to-sue letters precludes them from joining Anderson's suit.* They were given an opportunity to bring suit upon the issuance of the right-to-sue letter and failed to timely do so. (Emphasis added.) *Id.*

Thus, the individuals were barred from joining the pending ADEA action for failure to comply with the statute of limitations.

In *Mooney v. Aramco*, 54 F.3d 1207 (5th Cir. 1995), the court

again did not discuss distinctions between untimely filed charges and non-filed charges in context of the single filing rule. There, plaintiffs who had failed to raise allegations regarding discriminatory severance pay in their timely filed charges or their judicial complaint, attempted to rely on a charge filed by an individual no longer part of the case.

> To allow a plaintiff to file an EEOC charge, file suit upon that charge and then, at the eleventh hour, when the statute of limitations has run, to amend his complaint in reliance on the charge of another belies the policies behind the single filing rule and controverts congressional intent. *Mooney, supra*, at p. 1223.

Thus, the Fifth Circuit held that the single filing rule was inapplicable.

The *Anderson* and *Mooney* cases have no relevance to the issues raised in the petition. The courts never considered the effect of an untimely EEOC charge on an individual's right to invoke the single filing rule. *Anderson* concerned only the failure of the "piggybacking" individual to comply with the applicable statute of limitations. *Mooney* dealt with the right of plaintiffs to *expand* their judicial complaint based on a non-party's EEOC charge. Petitioner has never argued either in the lower court or on appeal that the statute of limitations or the scope of the Ivey charge is a bar to McNeely invoking the single filing rule.

No conflict exists in the Circuits. In fact, reported decisions have allowed individuals who filed an untimely administrative charge to piggy-back on a timely filed charge. Petitioner has cited no law to the contrary.

III.

BASED ON THE RECORD, IVEY'S CHARGE IS SUFFICIENT TO INVOKE THE SINGLE FILING RULE.

Petitioner argued for the first time in the Sixth Circuit and continues to assert on appeal that Mr. Ivey's charge is inadequate to support piggy-backing, because it was untimely. For the first time, petitioner in its petition for writ for certiorari also argues that the Ivey charge is defective because it is "non-deferred". Issues not raised in the trial court should not be passed on by this Court because no opportunity was given to respondent to produce relevant evidence or legal arguments. As this Court has previously stated, issues must be presented below because it is:

> essential in order that parties may have the opportunity to offer all the evidence that they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, [the opposing party] would, or could, offer . . . , but this is only because [it] has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, [the opposing party] should have the opportunity to present whatever legal arguments he may have. . . . *Singleton v Wulff*, 428 US 106, 120 (1976), quoting *Hormel v Helvering*, 312 US 552, 556 (1941).

The Court of Appeals noted that the timeliness of Ivey's charge was not raised before the district court. (App. A, p. A13.)

As a result, evidence relevant and critical to this issue is not part of the record. In fact, petitioner cannot establish many facts which it asserts without equivocation in its Petition for Writ of Certiorari. For example, petitioner cannot establish that Ivey's EEOC charge was untimely filed.

Even if petitioner's argument is properly before the Court, there is no merit to its position. To determine if Mr. Ivey's charge was timely, the time limits established in the ADEA must be considered. Section 626(d) provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such charge shall be filed —
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) *in a case to which section 633(b) applies, within 300 days after the alleged unlawful practice occurred*, . . .

Section 633(b) applies "in the case of an alleged unlawful practice *occurring* in a state which has the law prohibiting discrimination in employment because of age . . ." (Emphasis added.) In such a "deferral state" an aggrieved individual has 300 days to file a charge.

In this case, the discrimination against Mr. Ivey and the other plaintiffs occurred in Tennessee which has a law prohibiting age discrimination. Plaintiffs, therefore, had 300 days to file their charges. Those charges, filed within 300 days, were timely.

If the extended period is not available, Ivey's charge was still filed within the required 180 days. He initially contacted the EEOC on November 21, 1991, and his charge was reduced to writing by the investigator.[11] This action constitutes a valid charge. 29 C.F.R. § 1626.7; *Steffen v. Meridian Life Insurance Co.*, 859 F.2d 534 (7th Cir. 1988); *Philbin v. GE Capital Auto Lease*, 929 F.2d 326 (7th Cir. 1991). Moreover, the document on which petitioner relies would be considered filed, when postmarked, not when received. 29 C.F.R. § 1628.8. Thus the date stamp, asserted by petitioner as the date the charge was filed, is inaccurate and irrelevant. Ivey's charge was, therefore, timely if required to be filed within 180 days.

Additionally, the question of deferral is also not part of the record, since it was never raised until this Petition was filed. Thus the petition should be denied to the extent it relies on a claim of procedural inadequacy of Ivey's charge.[12]

---

11. Not part of the record because this issue was not raised below, the evidence is contained in Ivey's EEOC file.

12. Moreover, assuming petitioner could establish a requirement that the charge be deferred to a state agency, that would not support a reversal of the Sixth Circuit's opinion. Pursuant to *Oscar Mayer v. Evans*, 441 U.S. 750 (1979), deferral is not a jurisdictional requirement and therefore can be done at any time. In *Oscar Mayer*, deferral was permitted after this Court resolved the issue.

CONCLUSION

Gordon McNeely prays that this Court deny Holiday Inns' Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review, and because the Circuit Court's holding was not in error.

Respectfully submitted,

RUDY J. HUIZENGA
Counsel of Record
BETH M. RIVERS
HUIZENGA, HAGAN, HERGT
& RIVERS, P.C.
Attorneys for Respondent
1400 Penobscot Building
Detroit, Michigan 48226
(313) 963-4200

Dated: October 2, 1995